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FIAZ AHAMED IBRAHIM GANI

v.

PP

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COURT OF APPEAL, PUTRAJAYA
ABDUL MALIK ISHAK JCA
AZAHAR MOHAMED JCA
BALIA YUSOF WAHI JCA
[CRIMINAL APPEAL NO: B-05-44-2009]

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22 MAY 2013

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in dangerous drugs - Trafficking - Presumption under s. 37(da) - Whether possession affirmatively proven - Whether*

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presumption rebutted - Whether complete denial of prosecution's case - Whether passive possession made out

EVIDENCE: *Exhibit - Break in chain of evidence - Difference in gross weight of cannabis - Whether doubt raised as to storage and movement*

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of exhibit - Failure to call witness - Whether there was break in chain of evidence - Whether created doubt as to identity of cannabis

SP4 and SP5, while manning a police road block to check on stolen motorcycles at a motorcycle lane, saw the appellant, who made a U-turn and sped away. SP4 and SP5 chased and arrested

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the appellant and the appellant was taken to the road block. At the road block, the appellant was seen pushing something upwards inside the jacket he was wearing. A body search revealed a transparent plastic packet containing dried vegetable material suspected to be cannabis, a fact which was subsequently

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confirmed by the chemist. The appellant was therefore tried for the offence of trafficking in dangerous drugs, to wit 915 grammes of cannabis, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') and punishable under s. 39B(2) of the DDA. The learned High Court Judge made a specific finding that

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the appellant was in possession of the cannabis and as the weight of the cannabis was 915 grammes, the judge invoked the presumption under s. 37(da)(vi) of the DDA. The learned judge found that the appellant had failed to raise a reasonable doubt in the prosecution's case and that the appellant had failed to rebut

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the presumption of trafficking on the balance of probabilities.

Therefore, the appellant was convicted and sentenced to mandatory death sentence. Hence, the appeal by the appellant. The issues to be determined by the court were: (i) whether this was a case of possession and not trafficking; and (ii) whether the discrepancy in the weight of the drugs had compromised the case for the prosecution.

Held (dismissing appeal; affirming conviction and sentence of death)
Per Azahar Mohamed JCA delivering the judgment of the court:

(1) The learned High Court Judge made an express affirmative finding that the appellant was in possession of 915 grammes of cannabis thereby giving rise to the presumption of trafficking under s. 37(da)(vi) of the DDA. Section 37(da) is a rebuttable presumption and the evidential burden to rebut the statutory presumption lies on the appellant. The learned High Court Judge found that the appellant's defence was a complete denial of the prosecution case and had thus failed to rebut the presumption under s. 37(da). In the circumstances, the judge had correctly directed himself and the argument of the issue of passive possession lacked merit. (paras 9 & 10)

(2) The appellant was also aware of the nature of the cannabis that he was carrying. He was carrying on the motorcycle from one point to another, 915 grammes of cannabis which was an amount larger than was likely to be used for his own consumption. In any event, it was not part of the defence that the cannabis was for his own consumption and therefore, the appellant was not in passive possession of the cannabis. (para 11)

(3) The issue of the difference in the gross weight of the exhibit weighed by the investigating officer and the chemist lacked merit as the issue had been decided by the learned High Court Judge wholly on the facts and the prevailing circumstances of the case. The judge also found that there was no doubt raised as to the storage and the movement of the exhibits. In the circumstances, it was unnecessary for the prosecution to call one Inspector Rohayu to ensure that there was no break in the chain of evidence regarding the exhibit.

A Hence, based on the factual matrix of the case, the difference in the weight of the cannabis as found by SP3 and SP7 and the issue about the non-calling of Inspector Rohayu by themselves could not be said to have created a doubt as to the identity of the cannabis in question. (paras 12, 13, 15 &
B 16)

(4) The existence of reasonable doubt on the identity of the cannabis in question was dependent upon the totality of the evidence and on examination of all the evidence in a fair and
C reasonable manner and not in isolation. The totality of the evidence and the surrounding circumstances when taken together, irresistibly pointed to the fact that the cannabis tendered in the court which formed the subject matter of the charge was the one actually seized from the appellant. It had
D not been shown that the findings of the learned High Court Judge was against the weight of evidence or perverse in any way, warranting appellate interference. (para 16)

Bahasa Malaysia *Translation Of Headnotes*

E SP4 dan SP5, semasa mengendalikan sekatan jalan polis untuk memeriksa motosikal curi di lorong motosikal, ternampak perayu, yang membuat pusingan-U dan memecut. SP4 dan SP5 mengejar dan menangkap perayu dan membawa perayu ke sekatan jalan tersebut. Di sekatan jalan, perayu dilihat menolak sesuatu ke atas
F dari dalam jaket yang dipakainya. Pemeriksaan badan mendedahkan satu bungkusan plastik lutsinar mengandungi bahan tanaman kering disyaki kanabis, fakta yang kemudiannya disahkan oleh ahli kimia. Perayu, oleh itu, dibicarakan bagi kesalahan pengedaran dadah berbahaya, iaitu 915 gram kanabis, satu kesalahan di bawah
G s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') dan boleh dihukum di bawah s. 39B(2) ADB. Yang arif Hakim Mahkamah Tinggi membuat dapatan spesifik bahawa perayu mempunyai milikan kanabis tersebut dan oleh sebab berat kanabis tersebut adalah 915 gram, yang arif hakim membangkitkan anggapan di
H bawah s. 37(da)(vi) ADB. Yang arif hakim mendapati bahawa perayu telah gagal membangkitkan keraguan munasabah dalam kes pihak pendakwaan dan bahawa perayu telah gagal mematahkan anggapan pengedaran atas imbangan kebarangkalian. Oleh itu, perayu disabitkan dan dijatuhkan hukuman mati mandatori. Maka,
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rayuan ini oleh perayu. Isu-isu untuk diputuskan oleh mahkamah adalah: (i) sama ada ini merupakan kes milikan dan bukan pengedaran; dan (ii) sama ada percanggahan berat dadah menjejaskan kes pihak pendakwaan.

Diputuskan (menolak rayuan; mengesahkan sabitan dan hukuman mati)
Oleh Azahar Mohamed HMR menyampaikan penghakiman mahkamah:

(1) Yang arif Hakim Mahkamah Tinggi membuat dapatan ekspres yang afirmatif bahawa perayu mempunyai dalam milikannya 915 gram kanabis dan dengan itu membangkitkan anggapan pengedaran di bawah s. 37(da)(vi) ADB. Seksyen 37(da) adalah anggapan yang boleh dipatahkan dan beban keterangan untuk mematahkan anggapan statutori tersebut terletak atas perayu. Yang arif Hakim Mahkamah Tinggi mendapati bahawa pembelaan perayu adalah penafian sepenuhnya terhadap kes pihak pendakwaan dan dengan itu telah gagal mematahkan anggapan di bawah s. 37(da). Dalam hal keadaan tersebut, hakim telah, dengan betul, mengarahkan dirinya dan hujahan bahawa isu milikan pasif tidak bermerit.

(2) Perayu juga mengetahui tentang sifat kanabis yang dibawanya. Dia sedang membawa dalam motosikalnya dari satu tempat ke tempat yang lain, 915 gram kanabis yang merupakan jumlah yang lebih besar daripada yang mungkin digunakan untuk kegunaannya sendiri. Walau apapun, ia bukan sebahagian daripada pembelaannya bahawa kanabis tersebut adalah untuk kegunaannya sendiri dan oleh itu, perayu tidak mempunyai milikan pasif kanabis.

(3) Isu mengenai perbezaan dalam berat kasar ekshibit yang ditimbang oleh pegawai penyiasat dan ahli kimia tidak bermerit kerana isu tersebut telah diputuskan oleh yang arif Hakim Mahkamah Tinggi secara keseluruhannya berdasarkan kepada fakta dan hal keadaan sedia ada kes. Yang arif Hakim Mahkamah Tinggi juga mendapati bahawa tiada keraguan yang dibangkitkan berkaitan dengan penyimpanan dan pergerakan ekshibit-ekshibit. Dalam keadaan tersebut, adalah tidak perlu bagi pihak pendakwaan untuk memanggil seorang Inspektor Rohayu untuk memastikan bahawa tidak ada pemutusan

A rantaian keterangan berkaitan dengan ekshibit. Maka, berdasarkan kepada matriks fakta kes, perbezaan dalam berat kanabis seperti yang didapati oleh SP3 dan SP7 dan isu mengenai kegagalan memanggil Inspektor Rohayu tidak boleh dikatakan telah membentuk keraguan berkaitan dengan identiti B kanabis yang dipersoalkan.

(4) Kewujudan keraguan munasabah berkaitan identiti kanabis yang dipersoalkan bergantung kepada keseluruhan keterangan dan pemeriksaan kesemua keterangan secara adil dan C munasabah dan bukan secara berasingan. Keseluruhan keterangan dan hal keadaan sekeliling apabila dipertimbangkan bersama, secara tidak boleh disangkal menjurus kepada fakta bahawa kanabis yang dikemukakan di mahkamah yang membentuk subjek perkara pertuduhan adalah yang sebenarnya D dirampas daripada perayu. Ia tidak ditunjukkan bahawa dapatan yang arif Hakim Mahkamah Tinggi adalah bertentangan dengan beban keterangan atau berlawanan dalam apa cara sekalipun, yang mewajarkan campur tangan rayuan.

Case(s) referred to:
E *Akin Khan v. PP [1987] 1 CLJ 348; [1987] CLJ (Rep) 40 SC* ***(refd)***
Mohamad Yazri Minhat v. PP [2003] 2 CLJ 65 CA ***(refd)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***
Ng Chai Kem lwn. PP [1994] 2 CLJ 593 SC ***(refd)***
F *Ong Ah Chuan v. PP & Koh Chai Cheng v. PP [1980] 1 LNS 181 PC* ***(refd)***
PP v. Yuvaraj [1968] 1 LNS 116 PC ***(refd)***
Su Ah Ping v. PP [1979] 1 LNS 100 FC ***(refd)***

Legislation referred to:
G Dangerous Drugs Act 1952, ss. 37(da)(vi), 39B(1)(a), (2)

For the appellant - Hisyam Teh Poh Teik; M/s Teh Poh Teik & Co
For the respondent - Nurul Huda Nur A'ini; DPP

[Appeal from High Court, Shah Alam; Criminal Trial No: 45-6-2004]

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Reported by S Barathi

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JUDGMENT

Azahar Mohamed JCA:

[1] Fiaz Ahamed Ibrahim Gani ("the appellant") was charged and tried before the learned judge of the High Court at Shah Alam for trafficking in 915g of dangerous drugs, namely cannabis, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("DDA"), and punishable under s. 39B(2) of the DDA. The offence was said to have been committed at a motorcycle lane. The charge reads:

> Bahawa kamu pada 3 Mac 2003 jam lebih kurang 7.25 malam di lorong motosikal Plaza Tol LDP, Batu 14, Puchong, di dalam Daerah Petaling, di dalam Negeri Selangor Darul Ehsan, telah memperedarkan dadah berbahaya iaitu 915g Cannabis dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s. 39B(2) Akta yang sama.

[2] The learned High Court Judge at the conclusion of the trial convicted the appellant and sentenced him to the mandatory death penalty prescribed by the DDA. The appellant then appealed to this court. We heard his appeal, wherein at its conclusion we unanimously dismissed it. We affirmed the conviction and sentence. We now give our reasons.

[3] The essential facts as found by the learned High Court Judge are these. On 3 March 2003 at about 7.20pm, both Police Constable Gurmit Singh Hartajan Singh ("SP4") and Police Constable Nicholas Andy Filex Sipel ("SP5") were amongst a police party manning a police road block to check for stolen motorcycles at a motorcycle lane at toll Lebuhraya Damansara, Bt 14 Puchong, Selangor. While SP4 was on duty near the road block, he saw an approaching motorcycle Yamaha RXZ bearing registration number PBX 9512 ridden by a male (later identified as the appellant). When the motorcycle was 5-6 meters from SP4, it made a U-turn and tried to speed away. At that point of time, both SP4 and SP5 gave chase and succeeded in arresting the appellant. The appellant was then taken to the road block. The appellant was wearing a green jacket. At the road block, the appellant was seen pushing something upwards inside the jacket. SP4 asked the appellant to take it out. The appellant then handed to SP4 from inside his jacket a transparent plastic packet

containing dried vegetable material suspected to be cannabis. The plastic packet was then sent to the chemistry department for chemical examination and analysis. The packet was later confirmed by the chemist, Wan Rahimah Wan Ahmad ("SP3") to contain 915g of cannabis.

[4] On the basis of the evidence that we have discussed earlier, after the conclusion of the case for the prosecution, the learned High Court Judge came to the finding that the prosecution had made out a *prima facie* case against the appellant. The learned judge made a specific finding that the appellant was in possession of the cannabis in question. As the weight of the cannabis was 915g, the learned High Court Judge invoked the presumption under s. 37(da)(vi) of the DDA to presume that the appellant was trafficking in the dangerous drugs. The learned High Court Judge then called upon the appellant to enter his defence.

[5] The appellant elected to give sworn evidence. In essence, it was his defence that on the night of his arrest, he was asked by one Wajiman to send the plastic packet in question to one Addy. According to the appellant, he was told by Wajiman that the plastic packet contained "herbal tradisional". The appellant maintained he had no idea that its contents were cannabis.

[6] At the conclusion of the trial, the learned judge found that the appellant had failed to raise a reasonable doubt on the case of the prosecution and that the appellant had failed to rebut the presumption of trafficking on the balance of probabilities. As indicated earlier, the appellant was convicted of the offence and sentenced accordingly.

[7] Before us, the appellant raised two principal grounds in support of his appeal.

[8] The first relates to the issue of whether this is a case of possession and not trafficking. Learned counsel submitted that the learned High Court Judge had erred in law in that at the end of the defence case, His Lordship ought to have asked himself whether it was a case of passive possession. According to learned counsel, Encik Hisyam Teh Poh Teik, even though the appellant had actual possession of the cannabis in that he had physical custody and control of it, the said cannabis was in a single block and was not packed in numerous small packets that were ready for distribution.

[9] We are unable to accept these submissions. In the first place, as we have mentioned previously, based on the primary facts, the learned High Court Judge made an express affirmative finding that the appellant was in possession of 915g of cannabis thereby giving rise to the presumption of trafficking under s. 37(da)(vi) of the DDA. Here we will mention one important point regarding the operation of the presumption provisions. Section 37(da) is not a legal presumption which cannot be rebutted. The statutory presumption of trafficking is a rebuttable presumption. In the circumstances, the evidential burden that the appellant is not a drug trafficker of the cannabis in question lies on him. The standard of that evidential burden is the same as that applied in civil proceedings: the balance of probabilities (see: *PP v. Yuvaraj* [1968] 1 LNS 116; [1969] 2 MLJ 89, *Ng Chai Kem lwn. PP* [1994] 2 CLJ 593; [1994] 2 MLJ 210, SC and *Akin Khan v. PP* [1987] 1 CLJ 348; [1987] CLJ (Rep) 40; [1987] 2 MLJ 217, SC). An important point to note is that the evidential burden to rebut the statutory presumptions on a balance of probabilities is heavier than the burden of casting a reasonable doubt but is of course lighter than the burden of the prosecution to prove beyond a reasonable doubt (see: *Mohamad Radhi Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311; [1991] 3 MLJ 169). For this reason, it is incumbent on the learned High Court Judge in this case to consider whether the presumption that he invoked at the conclusion of the case for the prosecution had been rebutted on a balance of probabilities. A reading of the judgment of the learned High Court Judge shows that he has judicially appreciated this issue. In his judgment, this is what he said:

> Pembelaan tertuduh adalah 'a complete denial of the prosecution case'. Oleh itu beliau memilih untuk tidak langsung membuat apa-apa 'rebuttal' atau memberi keterangan 'on balance of probabilities' terhadap presumption s. 37(d)(a) ini berkaitan dengan 915g cannabis yang beliau miliki tersebut. Oleh itu mahkamah memutuskan yang tertuduh telah gagal menyangkal 'presumption' s. 37(d)(a) ini.

[10] The passage above makes it patently clear that nothing more may fairly be expected of the learned High Court Judge on this issue. In our judgment, he directed himself correctly upon this aspect of the law and that this direction is along the approach indicated in the case of *Mohamad Radhi Yaakob v. PP (supra)*. It

A is for these reasons that we are constrained to say that the arguments of learned counsel on the issue of 'passive possession' lacked merit.

[11] More than that, in the present case, the appellant was B aware of the nature of the cannabis he was carrying. He was carrying on the motorcycle from one point to another 915g of cannabis, which in our view an amount much larger than was likely to be used for his own consumption. In any case, it was not part of the appellant's defence that the cannabis was for his own C consumption. Therefore, in our view, the appellant was not in passive possession of the cannabis. In the absence of contradiction or in the absence of any credible explanation given by the appellant, we agree with the submissions of Puan Nurul Huda Nur A'ini, the learned Deputy Public Prosecutor that this D fact is sufficient to lead to a strong inference that the purpose for which the appellant was in possession of the cannabis was for the purpose of trafficking it to others known or unknown (see: *Ong Ah Chuan v. PP & Koh Chai Cheng v. PP* [1980] 1 LNS 181; [1981] 1 MLJ 64, PC and *Mohamad Yazri Minhat v. PP* [2003] E 2 CLJ 65; [2003] 2 MLJ 241).

[12] Turning now to the second ground, it was argued by learned counsel that the discrepancy in the weight of the drugs has compromised the case for the prosecution. According to the F chemist, SP3, the gross weight of the cannabis was 931.01g. However according to the investigating officer, Chief Inspector Suzalani Shafie ("SP7") the gross weight was 950g, thereby making a discrepancy of 18.99g.

[13] We found that the complaint of learned counsel lacked merit. G This is a factually based ground of appeal. In our judgment, this issue was decided by the learned High Court Judge wholly on the facts and the prevailing circumstances of the case. A scrutiny of the judgment of the learned High Court Judge, especially at pp. 175-176 vol. 2 of the appeal record, revealed that His H Lordship judicially appreciated this issue before coming to a definite finding of fact as follows:

> Pada pandangan saya, tidak terdapat apa-apa 'merit' ke atas hujah-hujah berkaitan perbezaan berat kasar exhibit yang ditimbang oleh I pegawai penyiasat dan oleh ahli kimia, memandangkan pertamanya, pegawai penyiasat dan ahli kimia menggunakan alat timbang mereka masing-masing dan bukannya satu alat timbang yang sama dan

keduanya, bahawa rantaian atau 'sequence of movement' ketulan tersebut daripada SP4 kepada pegawai penyiasat (SP7), pegawai forensik (SP8 dan SP9), ahli kimia (SP3) dan pengemukaannya di mahkamah, terbukti teratur dan mahkamah ini tidak mempunyai sebarang alasan untuk meraguinya. Tambahan pula tertuduh adalah dituduh dengan pertuduhan melibatkan berat bersih cannabis tersebut iaitu 915g dan bukannya berat kasarnya.

[14] We also do not agree with the arguments of learned counsel for the appellant that the prosecution should have called one Inspector Rohayu Abd Gani. SP7 testified that when he received the plastic packet containing the cannabis in question ("the exhibit") from SP4, he then marked it with his signature and wrote the letter "S" and the date '3 March 2003' on the plastic packet. On 8 March 2003, SP7 handed over the exhibit to ASP Izanizam Salleh ("SP9") of the police forensic department for the purpose of detecting finger print on the exhibit. After examining the exhibit, SP9 handed it over to Inspector Rohayu Abd Gani, who was responsible for the receipt and registration of exhibit. Sgt Saharuddin Mat Sayuti (SP8) testified that on 21 April 2003, he received the exhibit from Inspector Rohayu Abd Gani. After that, SP8 handed over the exhibit in question to SP7. In this regard, the learned High Court Judge in his judgment said:

Mahkamah ini mendapati tidak ada apa-apa keraguan tentang penyimpanan dan pergerakan exh. yang sama daripada SP4 kepada SP7 dan seterusnya ke Jabatan Forensik PDRM dan Jabatan Kimia, penerimaan semula dan penyimpanannya di stor penyimpanan barang-barang kes sehingga dikemukakan ke mahkamah.

[15] In the circumstances of this case, in our view, it is unnecessary for the prosecution to call Inspector Rohayu Abd Gani to ensure that there is no break in the chain of evidence regarding the exhibit. (see *Su Ah Ping v. PP* [1979] 1 LNS 100; [1980] 1 MLJ 75, FC).

[16] In our view, the complaint by learned counsel for the appellant here really turns upon a question based upon finding of facts by the learned High Court Judge. Hence, in our judgment, based on the factual matrix of the present case, the difference in the weight of the cannabis as found by SP3 and SP7 and the issue about the non-calling of Inspector Rohayu Abd Gani by themselves could not be said to have created a doubt as to the

identity of the cannabis in question. An appellate court would be slow to disturb a trial court's finding of facts in the absence of any perverse and unwarranted finding on the totality of the evidence before it. In our view, the court must exercise a certain measure of caution and prudence not to accept and believe any possible doubt raised. The existence of reasonable doubt on the identity of the cannabis in question is dependent upon the totality of the evidence and on an examination of all the evidence in a fair and reasonable manner and not in isolation. In our judgment, the totality of the evidence and the surrounding circumstances when taken together irresistibly point to this: the cannabis tendered in court which form the subject matter of the charge was the one actually seized from the appellant. It has not been shown that the findings of the learned High Court Judge is against the weight of evidence or perverse in any way, warranting appellate interference.

[17] For all these reasons, we found no merits in this appeal. We found the conviction of the appellant safe. We had, therefore, dismissed the appeal. We affirmed the conviction and the sentence of death imposed by the learned High Court upon the appellant.